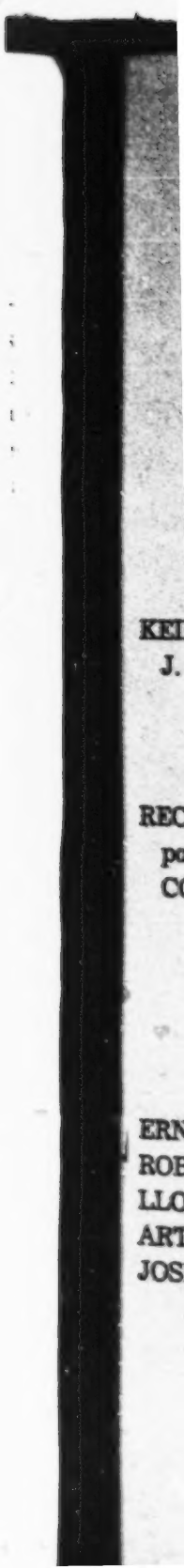

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

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Petitioner,

vs.

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Respondents.

REPLY BRIEF OF PETITIONER

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Table Of Cases

	Page
Federal Land Bank v. Priddy, 295 U. S. 229, 231, 232	2, 3
Gosford v. Star Van & Storage Co., 104 Neb. 453, 177 N. W. 794	4
Kawananakoa v. Polyblank, 205 U. S. 349, 27 S. Ct. Rep. 526	2
Sloan Shipyards Corporation v. United States Shipping Board, 258 U. S. 549, 42 S. Ct. Rep. 386	3
The Lake Monroe, 250 U. S. 246	3
The Western Maid, 257 U. S. 419	3

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While we appreciate that the rules of the United States Supreme Court make no provision for the filing of a reply brief, we feel constrained to request the court for leave to file this brief for the purpose of calling attention to the inaccuracies and unfairness of certain statements and assertions made in the brief of the respondent, Regional.

The first of these misstatements, which is one of law, is to the effect that "instrumentalities of the federal government are immune from suit unless Congress has unmistakably and expressly subjected them to suit." No case cited by the respondent makes any such statement. The cases cited by the respondent in this respect are only to

the effect that the United States itself as a sovereign, is immune from suit, which latter proposition is so well established as to not be subject to argument. However, the authorities cited, far from sustaining the proposition urged by the respondent, sustain the position taken by us that immunity from suit of an instrumentality is to be determined by the intent of Congress and that the intent of Congress is in this respect determined by the type of entity set up and the nature of its business. The cases cited by respondent so far as pertinent, sustain this rule. For example, the reason for the immunity is stated:

> "A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

and the reason that the immunity of the sovereign is not extended without the express direction of Congress to any instrumentality such as the Regional, is that it does not have the power to make or change the laws of the land:

> "As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended *to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights.* A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 27 S. Ct. Rep. 526 (Italics ours).

The following quotation from *Federal Land Bank* v.

Priddy, 295 U. S. 229, 231, 232, states exactly the opposite of what the respondent contended it contained.

> "Whether federal agencies are subjected to suit, and, if so, the extent to which they are amenable to judicial process, *is thus a question of the congressional intent.* See *The Lake Monroe*, 250 U. S. 246, 249, 39 S. Ct. 460, 63 L. Ed. 962; *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 559, 41 S. Ct. 593, 65 L. Ed. 1087. If the answer is not made plain by the words of the statute, it is necessary to ascertain, by examination of the purposes and organization of the federal farm loan system, whether immunity from attachment is granted by implication" (Italics ours).

Another case cited by the respondent, *The Lake Monroe*, 250 U. S. 246, is an action involving a vessel whose ownership was transferred to the fleet corporation, which is a government owned corporation which was not expressly made subject to suit. Yet, as a result of the fact that this corporation owned the ship named The Lake Monroe, the action was held to lie, although it would not have been held to lie had the ship been owned directly by the government as shown by *The Western Maid*, 257 U. S. 419, also cited by the respondent. The correct rule is well expressed in Syllabus 2 of *Sloan Shipyards Corporation* v. *United States Shipping Board*, 258 U. S. 549, 42 S. Ct. Rep. 386:

> "The exemption of the sovereign from liability to suit does not extend to an agent to whom authority has been delegated by the President merely because he is such agent, whether the agent be an individual or a corporation which in law is a person, so that such agent is answerable for his own acts unless protected by some constitutional rule of law."

The expression of Judge Taft in his dissenting opinion,

which agreed with the majority opinion on that particular point, was in the following language:

> "I concede that the legislation originally creating this corporation, without express immunity from suit, naturally gives rise to the inference that Congress concluded that the greater freedom of action secured by carrying on business in corporate form was desirable and that in the absence of express provision for it, and in respect to what the corporation was originally intended to do, immunity cannot be reasonably implied from the relation of the government to the corporation and its interest in its business."

Another point on which the brief of the respondent is unfair is in the statement of the facts. On page 5 of the respondent's brief, an attempt is made to convey the impression to this court that the Regional was to care for petitioner's cattle as a matter of profit only to the petitioner and without any consideration. This position is not correct in view of the fact that the Regional charged the highly excessive price of $14.00 per head for wintering said livestock as shown by said contract (R. 32).

The Regional tries to amplify this position by then setting out a provision of the contract (R. 32) which particular provision has been held to be void as against public policy by the Eighth Circuit Court of Appeals by virtue of the Nebraska authorities to the effect that a party may not contract against his own negligence. *Gesford* v. *Star Van & Storage Co.*, 104 Neb. 453, 177 N. W. 794.

The inference in respondent's brief is particularly offensive and unfair when the actual facts (which will be proven under petitioner's allegations (See R. 27)), will establish that the recitations in said contract in regard to petitioner's necessity for relief were false and untrue, and that said contract in its entirety was obtained by fraudulent repre-

sentations and coercion, that petitioners had more satisfactory means of caring for said cattle but because of the fraudulent representation and coercion alleged submitted to the Regional attempting to winter said cattle.

Possibly the strongest illustration, however, of the unfairness of the respondent's brief is the contents of the appendix from pages 25 to 50 inclusive. Within those pages of respondent's brief are contained certain portions of correspondence, bulletins and opinions of different employees of either the Reconstruction Finance Corporation, the Regional Agricultural Credit Corporation or government agencies. The respondent would not be able to place the facts asserted in these bulletins in evidence for the reason that they are obviously self-serving, for the further reason that they are simply excerpts and many of them expressly state that they are secret or not for publication.

These 25 pages do not contain any acts of Congress or any judicial opinions. The facts stated in those 25 pages are no more entitled to consideration by this court than our letters written to the petitioner expressing a legal opinion as to its rights in this controversy.

Perhaps the most offensive thing about the appendix is the fact that it contains only excerpts. This becomes particularly significant when it is known that some of the portions stricken are much more pertinent to the issues submitted to this court than the portions attached. An instance of this is in regard to the opinion of the general counsel as to exemption of the Regional Agricultural Credit Corporation from taxation by states and local authorities. The opinion itself is set forth on page 44 of the appendix attached to respondent's brief. However, the brief in support of the opinion which brief is deleted, contains a very significant phrase:

> "A striking analogy between the United States Shipping Board Emergency Fleet Corporation and that of the Regional Agricultural Credit Corporation appears

There is indeed a striking similarity between the Regional Agricultural Credit Corporations formed by the Reconstruction Finance Corporation and the United States Shipping Board Emergency Fleet Corporation formed by the Shipping Board (an incorporated agency immune from suit) and the parallel illustrates that there are far more reasons for holding that Congress intended that the Regional be subject to suit than there was for holding as the court did, that the United States Shipping Board Emergency Fleet Corporation was subject to suit.

Congress has expressed an intention that the Regional be subject to suit by having the R. F. C. form the Regional as a separate and distinct entity, by using the word "corporation" in the Regional's name and by causing the Regional to be organized as a corporation. This intention is further expressed by the very fact that no exemption from suit of the distinct entity so formed was provided and because the Regional was authorized to and did engage in purely business enterprises.

Respectfully submitted,

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